

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING, *et. al.*,

No. C-12-1830 EMC

Plaintiffs,

**ORDER DENYING DEFENDANT'S
MOTION FOR RELIEF FROM
NONDISPOSITIVE PRETRIAL ORDER
OF MAGISTRATE JUDGE**

v.

LAW SCHOOL ADMISSION COUNCIL,
INC.,

(Docket No. 151)

Defendant.

Defendant Law School Admission Council ("LSAC") has filed a motion for relief from a discovery order issued by Judge Westmore. See Docket No. 148 (order). Under federal law, "[a] non-dispositive order entered by a magistrate [judge] must be deferred to unless it is 'clearly erroneous or contrary to law.'" *Grimes v. City & County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991). For the reasons discussed below, LSAC's motion is **DENIED**.

I. DISCUSSION

As to the DFEH case files, LSAC argues first that Judge Westmore erred because she found there to be a work product privilege without any actual evidence (such as a declaration) to support that claim of privilege. See Mot. at 3 (arguing that Judge Westmore "implicitly accepted the premise that DFEH's investigation has always been a 'non-standard,' attorney-led investigation at all stages and at all times, without any proof"). However, it does not appear that LSAC ever made

1 the argument before Judge Westmore that such proof was necessary.¹ ““Motions for reconsideration
2 and objections to a Magistrate Judge’s order are not the place for a party to make a new argument
3 and raise facts not addressed in his original brief.”” *Harbridge v. Yates*, No. 1:10-cv-00473 AWI
4 JLT (PC), 2012 U.S. Dist. LEXIS 23909, at *3 (E.D. Cal. Feb. 24, 2012).

5 Second, LSAC argues that Judge Westmore erred in finding the documents privileged
6 because the investigation was not conducted in anticipation of litigation. However, similar to above,
7 LSAC never raised this specific argument before Judge Westmore (and, in fact, did not even raise
8 the argument in its opening motion filed with *this* Court) – even though it could have, given DFEH’s
9 representation in the joint letter that “DFEH investigators prepared the documents under the
10 direction and supervision of the agency’s attorney-managed Special Investigations Unit (SIU) after
11 the DFEH made a preliminary determination of cause in the Director’s Complaint, filed July 22,
12 2010.” Docket No. 141 (Letter at 20). Instead, as reflected in the joint letter, LSAC simply relied
13 on the contention that investigatory documents are routinely produced pursuant to DFEH directives.
14 If LSAC had challenged at the outset DFEH’s claim of work product privilege on the grounds that
15 an investigation conducted under the direction of counsel does not establish it was done in
16 anticipation of litigation, DFEH might well have provided a specific rebuttal on this point as part of
17 its presentation to Judge Westmore. But LSAC did not timely raise this argument, waiting instead to
18 raise it for the first time in its reply brief filed in this Court.

19 Finally, to the extent LSAC argues that Judge Westmore erred with respect to the DFEH case
20 files because she made a “blanket” ruling regarding privilege without expressly preserving for
21 LSAC the right to make document-specific challenges, that argument too is without merit. LSAC
22 never presented any document-specific challenges to Judge Westmore or nor did it otherwise
23 indicate to her that it sought the right to preserve the ability to make such challenges. Accordingly,
24 the Court cannot say that Judge Westmore clearly erred or that she acted contrary to law.

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27 ¹ The Court notes that DFEH cannot be faulted for not providing to Judge Westmore
28 evidence to support its claim of privilege because her standing order prohibited it from doing so. In
its opposition brief, DFEH has now provided the Seldin declaration, but the Court need not consider
the contents of that declaration to resolve the pending motion.

1 As for the common interest doctrine, here as well the Court does not find either clear error or
2 an act contrary to law.


3 **II. CONCLUSION**

4 Accordingly, the Court **DENIES** LSAC's motion for relief as well as its alternative request
5 for relief. This ruling, however, does not preclude LSAC from seeking reconsideration from (based
6 on new argument or evidence) Judge Westmore in the first instance.

7 This order disposes of Docket No. 151.

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9 IT IS SO ORDERED.

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11 Dated: July 23, 2013

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13 EDWARD M. CHEN
14 United States District Judge
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